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THE EU VS. RUSSIA: LEGAL NATURE AND IMPLEMENTATION OF THE UNION'S RESTRICTIVE MEASURES

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The author proposes his take on the EU sanctions against Russia. He aims to understand the legal nature of the EU restrictions, the exact procedure of their implementation, revision, and repeal, as well as their judicial review. To this end, he proposes a system of sanction classification, analyses current EU legislation on the imposition and implementation of sanctions, as well as the case law on the sanction policy.

The author also examines EU sanctions imposed on other countries and compares them to the Russian ones. He thus comes up with the following classification of sanctions against Russia: individual sanctions, those targeted at Crimea and Sevastopol, and anti-Russian economic sanctions. He concludes that the EU sanctions against Russia are inconsistent with the legal nature of restrictive measures, since they are a punishment rather than a policy tool.

The author believes that in the current political conditions it may be difficult for the European Union to reach a unanimous agreement to repeal or prolong the sanctions.

This article is inspired by the discussions that took place during the international conference "Russia and the EU: the Question of Trust" held in Luxembourg on November, 28—29 (2014).

Key words: Russia, European Union, restrictive measures, sanctions

The EU policy of imposing restrictive measures (sanctions) on third countries has a long history [1]. The EU imposes restriction on third countries and non-state structures, natural and legal persons as a response to their political actions.

In accordance with the principles contained in the Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Secu-

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riety Policy [2] (further referred to as Guidelines on Implementation of Restrictive Measures), restrictive measures (sanctions) can be defined as measures taken by the EU Council (further referred to as the Council) within a common foreign and security policy against certain states, organisations, and citizens to bring about a change in the policy or activities of this state, part of a state, government, entities, or individuals in compliance with the purposes of the EU foreign policy formulated in Article 21 of the Treaty on the Functioning of the European Union (further referred to as TFEU).

The legal framework for imposing sanctions is provisions of Chapter 2, section V of the Treaty on the European Union (further, TEU), as well as Articles 75 and 215 of TFEU.

It is worth stressing that the EU legal vocabulary uses the term ‘sanctions’ alongside the term ‘restrictive measures’. However, the primary and secondary legislation acts use the notion of ‘restrictive measures’. In this article, both terms will be used interchangeably.

In accordance with the current EU legislation, sanctions are imposed in two stages. At the first stage, the Council adopts a decision in the framework of the common foreign and security policy (CFSP) and in compliance with Article 29 TEU. This decision contains a list of measures, persons and entities subject to sanctions, as well as reasons for their imposition.

At the second stage, the measures foreseen in the Council Decision are implemented either at the EU or at the national level. Measures such as arms embargoes or restrictions on admission and visa bans are implemented directly by the member states, which are legally bound to act in conformity with the Council decisions. [2].

Other measures breaking down or suspending economic relations (including freezing funds and economic resources) with a third country are implemented by means of regulations, adopted by the Council, acting by qualified majority, on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, under Article 215 TFEU.

According to Article 288 TFEU, such regulations are generally applied and should be binding in their entirety and are observed in all member states. As any other EU acts, they are subject to judicial review by the Court of Justice.

The year 2014 was crucial for the EU sanction policy. The European Union adopted a package of restrictive measures targeting the Russian Federation — the EU’s third largest trade partner. In view of the pre-sanction level of EU-Russia relations, it is worth stressing that the adoption of economic restrictive measures was a serious challenge both to Russia and the European Union.

This article aims to study the EU sanctions against the Russian Federation, the procedures of their implementation, revision, repeal, and judicial review. At the moment, one can identify three types of sanctions targeting Russia.

The first type, which can be called ‘individual’ sanctions, targets certain people and organisations responsible, according to the EU, for violating the sovereignty and territorial integrity of Ukraine. The first package of individ-

ual sanctions was adopted on March 17, 2014. Individual sanctions suggest restrictions on admission, visa bans, and freezing of assets of certain natural and legal persons.

Another type of sanctions is restrictive measures for Crimea and Sevastopol adopted on June 23, 2014 in response to the incorporation and full integration of the peninsula into the Russian Federation.

The third type of sanctions is, strictly speaking, anti-Russian economic sanctions adopted on July 31, 2014 after the Malaysian Boeing crash. These sanctions can be qualified as ‘anti-Russian,’ since their adoption followed the EU’s official accusation of Russia of the crisis in Ukraine.

As of late December 2014, the EU Council adopted approximately 30 acts imposing restrictive measures against the Russian Federation. All acts of the Council imposing sanctions against Russia can be roughly divided into basic and additional ones. The basic acts include decisions and regulations launching a certain types of sanctions (individual, those for Crimea and Sevastopol, and economic ones). Additional acts are decisions and regulations used to amend and update basic acts.

Within the above classification, one can identify the following basic acts:

1) Council Decision 2014/145/CFSP of March 17, 2014 [3, p. 16—21] and the Council Regulation (EU) N 269/2014 of March 17, 2014 [4, p. 6—15] imposing individual sanctions;

2) Council Decision 2014/386/CFSP of June 23, 2014 [5, p. 70—71] and the Council Regulation (EU) N 692/2014 of June 23, 2014 [6, p. 9—14] concerning restrictions on goods originating in Crimea or Sevastopol and any investment in the peninsula;

3. Council Decision 2014/512/CFSP of July 31, 2014 [7, p. 3—17] and the Council Regulation (EU) N 833/2014 of July 31, 2014 [8, p. 1—11] imposing anti-Russian economic sanctions.

All other acts (the Council Decision, the Council Implementation Decision, the Council Regulation, the Council Implementation Regulation) are additional ones.

In accordance with the key principles outlined in the Guidelines on Implementation of Restrictive Measures, sanctions are a preventive and non-punitive instrument. Therefore, restrictive measures cannot be a punishment for any actions. Therefore, based on their nature, restrictive measures are adopted to bring about a change in policy or activity by the target country, part of country, government, entities or individuals.

As to the sanction policy against Russia, restrictive measures were adopted disregarding this principle. From the very beginning of the sanction policy against Russia, it has been evident that restrictive measures would not bring about a change in the country’s policies. Therefore, sanctions were adopted not as a preventive measures, but as a punishment for the Russian actions in Crimea and South-East Ukraine, which, from the EU’s perspective, violated the principles of international law. This conclusion follows from the preamble to the Council Regulation (EU) N 833/2014 (paragraph 2): “It is therefore considered appropriate to apply additional restrictive measures with a view to increasing the costs of Russia’s actions to under-

mine Ukraine's territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis". This justification shows that the major purpose of restrictive measures was not bringing about a change in Russia's policies but rather punishing the country.

As of early December 2013, the EU sanctions against Russia included the following restrictions:

- 1) restrictions on admission and visa bans for individuals;
- 2) freezing of assets and economic resources for natural and legal persons;
- 3) prohibition on goods originating from Crimea or Sevastopol and restriction on investment in these territories;
- 4) prohibition on the sales, transfer, or export of goods and technologies for the military and oil industries;
- 5) prohibition on imports and exports of arms from/in Russia (arms embargo);
- 6) prohibition on provision of financial services to Russian banks and other financial restrictions.

The measures relating to arms embargo, restrictions on admission, and visa bans are to be implemented at the national level. Visa bans are enforced through entering the data on certain individual into the Schengen Information System in compliance with Article 25 of Council and European Parliament Regulation N 1987/2006 [9, p. 4—23].

According to the Guidelines on Implementation of Restrictive Measures, the Member State holding the Presidency of the Council of the EU at the time of the adoption of the instrument containing the lists is responsible for entering the data in the Schengen Information System. That state is responsible for any necessary updates, corrections and/or deletions.

In order to mitigate the negative effects for European companies, the EU Council included a rule in Regulations N 833/2014 (Article 11) and **N 692/2014 (Article 6) that prohibits the satisfaction of** claims in connection with any contract or transaction, whose performance has been affected by the restrictive measures. Moreover, in accordance with the provisions of above regulations, in any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not affected by the sanctions is on the claimant. In other words, the onus of proving that the restrictive measures do not prohibit a certain transaction is not on the European company which refuses to perform a contract in reference to the sanctions, but on the person that demands contract performance.

Of course, these provision violate the basic principles of civil law [10].

In accordance with the established practice, the European Union adopts restrictive measures for a certain period or without specifying such period under the condition that these measures will be revised as the situation changes. The time limit of restrictive measures is established only by the Council Decisions, regulations do not contain such details. In the case of Russia, restrictive measures were imposed for a period from six to twelve months.

The first group of sanctions was adopted in accordance with the Council Decision N 2014/145/CFSP of March 17, 2014 until September 17, 2014. the Council Decision N 2014/658/CFSP of September 8, 2014 renewed sanctions until March 15, 2015.

The second group of sanctions concerning Crimea and Sevastopol was adopted by the Council Decision N 2014/386/CFSP until June 23, 2015.

The third group of economic sanctions was adopted until July 31, 2015 (the Council Decision N 2014/512/CFSP of July 31, 2014).

Moreover, the Council Decisions stress that restrictive measures should be revisited on a regular basis in view of the current situation.

The current EU legislation provides a possibility for challenging the imposed sanctions in court.

In accordance with Article 263 TFEU, the EU Court of Justice reviews the legality of legislative acts and acts of the Council. According to Article 275 TFEU, the EU Court of Justice does not have jurisdiction over the provisions relating to the common foreign and security policy. However, this rule does not extend to the claims of natural and legal persons regarding the revision of restrictive measures. It means that the Council decisions and regulations on imposing restrictive measures can be challenged in court at suits of natural and legal persons against which these measures were imposed. In other words, claimants in such cases can be companies and individuals, but not Russia as a state subject to sanctions.

As of today, a number of Russian companies and individuals have challenged the Council Decision on imposing sanctions at the EU Court of Justice (*Vnesheconombank v Council*, case T-737/14; *Gazprom Neft v Council*, case T-735/14; *VTB v Council*, case T-734/14; *Sberbank of Russia v Council*, case T-732/14; *Rosneft v Council*, case T-715/14; *Rotenberg v Council*, cases T-720/14 and T-717/14).

In the above cases, the claimants are companies and a natural person subject to sanctions. According to Articles 263 and 275 TFEU, other persons also have the right to bring a claim if the sanctions affect them directly and individually. Therefore, to bring a claim, a person not included in the sanction list has to prove that, firstly, they are directly affected by the sanctions and, secondly, that sanctions are of 'individual concern' to them.

For instance, in the case of *Plaumann & Co. v Commission* [11], the Court ruled that the persons other than those addressed in the challenged decision have the right to appeal if that decision affects them due to certain attributes peculiar to them or due to circumstances differentiating them from all other persons, therefore this decisions distinguishes them individually just as in the case of the person addressed.

As mention above, Russia is not the first country subject to the EU restrictive measures. The EU Court of Justice has considered numerous cases challenging sanctions. In some cases, the EU Court of Justice accepts the claimants' arguments and satisfies the application for annulment of the Council Decision on imposing sanctions.

Good examples are the cases pursued on behalf of Iranian companies: case T 496/10 *Bank Mellat v Council* [12] and case T-565/12 *National Iranian Tanker Company v Council* [13].

In case T-496/10, the Court ruled that the reasons for imposing restrictive measures against the applicant were insufficient. Moreover, the Court decided that the Council failed to disclose to the applicant the evidence considered to inculcate it.

In case T-565/12, the Court ruled that it is the task of the competent European Union authority to establish that the reasons relied on against the person concerned are well founded, and it is not the task of that person to adduce evidence of the negative. As a result, the Court decided that the case files did not contain evidence to support the Council's claims that the applicant was controlled by the Government of Iran and the applicant supported the latter financially. Thus, the Court ruled to annul the acts imposing sanctions against the applicant.

The details of these cases suggest that the arguments used by the Court are not likely to be used in the Russian cases.

The reasons for including Russian companies in the sanction list was their close connection to the state (a government stake in the authorised capital of at least 50%). The circumstances justifying the listing of these companies does not include their direct involvement in the Ukrainian events. The key reason behind the listing of these organisations was damaging Russia's economy.

In view of the fact that all the above organisations are largest stakeholders in the key industries of the Russian economy, it will be much easier for the Council to justify the reasons for listing than it was in the Iranian cases.

The major questions — as to why the EU holds Russia responsible for the Ukrainian crisis and whether the evidence thereof is reliable — will not be considered by the Court, because the issues of foreign and security policy are beyond the Court's jurisdiction.

As to the case of Rotenberg, the claimant has a good chance of winning it in court. As mentioned in Council Decision 2014/508/CFSP of July 30, 2014, Rotenberg is accused, firstly, of being Putin's old acquaintance and his former judo sparring partner, secondly, of that the Russian authorities favour him in allocating lucrative government contracts. In particular, Rotenberg's companies were given a number of high-yielding contracts in the framework of preparations for the Sochi Olympics. Thirdly, Rotenberg is a shareholder of OAO Giprottransmost, which was given the contract for the feasibility report for the construction of a bridge to Crimea, which contributes to the integration of the peninsula into the Russian Federation and thus undermines the territorial integrity of Ukraine.

The first two reasons for listing Rotenberg cannot be regarded justification for imposing restrictive measures against a natural person, for, as common sense suggests, friendship with the President of Russia and winning government contract cannot be considered illegal activities. As to the third reason regarding the feasibility report contract, it is also of a limited evidential effect. OAO Giprottransmost is a unique company with a 75-year history and a feasibility report for the construction of a bridge to Crimea can hardly be considered a violation of the territorial integrity of Ukraine. Moreover, based on the general principles of civil legislations, shareholders are responsible for the company's activities only to the extent permitted by applicable law. Therefore, this justification is not sufficient for the listing of the applicant.

However, regardless of the results of the cases challenging the anti-Russian sanctions, this cases will have great significance both in political and legal terms.

It is worth stressing that the sanction list was prepared within a limited time period using open and unverified information. Therefore, the quality of the sanction list is rather low.

For instance the Guidelines on Implementation of Restrictive Measures suggest that the list of persons subject to sanctions should include detailed information (surname, first name (also in the language of the person), alias, sex, date and place of birth, nationality and address, identification or passport number). The sanction list adopted by Council Regulation 2014/658/CFSP of September 8, 2014 contains information on certain individuals without providing data sufficient for identification (full name, date and place of birth). For instance, it provides the following information: Oleg Bereza, Alexandr Karaman, etc. It is evident that these data can be applicable to a large number of nationals of Russia, Ukraine, Belarus, and other post-Soviet states.

It is worth stressing the mistake made in regard of Vladimir Zhirinovsky. It seems that the authors of the Council Decision copied his details from Wikipedia without analysing them. As a result, Council Decision 2014/658/CFSP of September 8, 2014 contains the following information: Vladimir Volfovich Zhirnovsky, born on 10.6.1964 in Eidelshstein, Kasakhstan. In reality, Zhirinovsky was born on April 25, 1946 in Alma-Ata and Eidelsthein was the name of the politician, which he changed on June 10, 1964. This mistake was corrected only in November 2014 in accordance with Council Decision N 2014/801/CFSP of November 17, 2014 [14].

Therefore, one can arrive at the following conclusions:

1. Technically, the sanctions against Russia were adopted in compliance with the EU competence in the framework of an established procedure, but without sufficient evidence and based on subjective assessments.

2. The sanctions against Russia can be divided into three groups: individual, sanctions for Crimea and Sevastopol, and anti-Russian economic sanctions.

3. Sanctions against Russia do not correspond to the nature of restrictive measures, being a punishment rather than an instrument to bring about a change in policies.

4. Sanctions against certain individuals were adopted without any justification, without providing sufficient reasons, and based on unverified information.

5. The analysis of the current political situation and the particularities of sanctions adoption suggests that early abolition of restrictive measures is rather unlikely. The chances of Russian companies subject to sanctions to win in court are also small. Therefore, one can assume that the restrictive measures against Russia will stay in force until their expiration, namely, March, June, and July 2015.

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